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No. 02-626

IN THE
SUPREME COURT OF THE UNITED STATES

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner,

-v.-

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* OF THE CITY OF NEW YORK, THE NATIONAL LEAGUE OF CITIES, THE ASSOCIATION OF METROPOLITAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, AND THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the transfer of untreated water from one natural source to another constitutes an "addition" of pollutants under the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of this Court, the City of New York, the National League of Cities, the Association of Metropolitan Water Agencies, the National Association of Flood and Stormwater Management Agencies, and the Association of Metropolitan Sewerage Agencies, request leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Consent for *amici* participation was requested of all parties on November 6, 2002, but was denied by respondents Miccosukee Tribe of Indians and Friends of the Everglades.

INTERESTS OF *AMICI CURIAE*

Amici curiae submit this brief in support of the South Florida Water Management District's petition for a writ of certiorari to the Supreme Court, seeking reversal of the lower court's decision in *Miccosukee Tribe of Indians, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).[1]

Transfers and diversions of untreated water are essential to the design and operation of public water supply systems as well as to municipal and regional flood control and water management efforts. All surface water supply systems involving more than a single reservoir rely

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[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.

fundamentally on local governments' ability to move water from one source to another to meet local water supply needs. Similarly, countless water management systems throughout the country transfer water to areas that need water or away from areas in danger of flooding. Petitioner asks the Court to reverse a decision by the Eleventh Circuit Court of Appeals that threatens the operation of all such systems.

Until recently, no court or regulatory agency has suggested that transfers of natural water, in the context of routine municipal water management activities, require Clean Water Act permits (National Pollutant Discharge Elimination System, or NPDES permits). Virtually none of the millions of dams, levees, aqueducts, canals, and other structures used by the federal, state, and local governments for ordinary management of water, for public water supply, flood control, commerce, and other governmental and public purposes, currently operates pursuant to such a federal permit.

Most such water management structures predate the enactment of the Clean Water Act in 1972 and have been in continuous operation since that time. The holding of the Eleventh Circuit in the instant case, and the recent similar holding of the Second Circuit in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001), which was essentially adopted by the Eleventh Circuit in *Miccosukee*, could disrupt these basic governmental functions.

Amici are local governments, water suppliers, and consortia of cities or local water management agencies. The local water management authority of each *amicus* has been superseded by the Eleventh Circuit's decision—

contrary to Congress' intent in enacting the Clean Water Act.

The City of New York is a political subdivision of the State of New York that owns and operates a water supply system that provides water of excellent quality to some nine million residents of the City and State of New York. The City's water supply system depends on transfers of natural, untreated water from each reservoir downstream to the next. As discussed below, the City's ability to supply sufficient water to fulfill its demand is threatened by the Second Circuit's decision in *Catskill Mountains*.

The National League of Cities (NLC) is the oldest and largest national organization representing municipal governments throughout the United States. NLC serves as a national resource and advocate on behalf of over 1,800 member cities and for 49 state municipal leagues whose membership totals more than 18,000 cities and towns across the country. The specific interest of the National League of Cities—which advocates for municipal interests at the federal level—in this case lies in the fact that municipal governments have historic authority and responsibilities to protect public safety and the health of their citizens in the management of their resources.

The Association of Metropolitan Water Agencies (AMWA) represents the nation's largest publicly-owned municipal drinking water suppliers. AMWA's 168 members include agencies and divisions of city governments, and special purpose commissions, districts, agencies and authorities created under state law to supply drinking water to the public. AMWA's members provide drinking water to over 110 million people throughout the country. Many AMWA member agencies own or operate lakes, reservoirs, dams, aqueducts, tunnels, pipelines and

other conveyances in and through which source waters are collected, stored, moved and otherwise managed as part of their mission to supply adequate supplies of drinking water to the populations they serve. Water management activities in the facilities of many AMWA members involve transfers from one water source or body to another.

The National Association of Flood and Stormwater Management Agencies (NAFSMA), established in 1979, represents more than 100 local and state flood control and stormwater management agencies. NAFSMA members are public agencies whose function is the protection of lives, property and economic activity from the adverse impacts of storm and flood waters. NAFSMA member activities are also focused on the improvement of the health and quality of our nation's waters. The mission of the association is to advocate public policy, encourage technologies and conduct education programs to facilitate and enhance the achievement of the public service functions of its members. NAFSMA is concerned that routine flood management activities would require NPDES permits under the Circuit Court's decision.

The Association of Metropolitan Sewerage Agencies (AMSA) has represented the nation's publicly-owned wastewater treatment agencies (POTWs) since 1970. AMSA's over 270 member agencies provide the majority of the U.S. population with sewer service and collectively treat and reclaim over 18 billion gallons of wastewater each day. AMSA members are concerned that the Eleventh Circuit's decision will subject thousands of new local governmental water management decisions to NPDES permits.

SUMMARY OF ARGUMENT

During the 30 years since its enactment, the Clean Water Act has never, until recently, been interpreted to regulate transfers and diversions of natural, untreated water. Many municipal and regional water management systems existed in the United States for decades before the enactment of the Clean Water Act in 1972. Pub. L. 92-500, 86 Stat. 880 (Oct. 18, 1972). The United States Environmental Protection Agency (EPA) has never required that such transfers and diversions operate pursuant to Clean Water Act NPDES permits. Similarly, none of the more than 40 states with delegated authority to administer the Clean Water Act permit program by EPA has historically required Clean Water Act permits for these water transfers and diversions.

Indeed, with the Clean Water Act permit program having been in place for 30 years, EPA and the delegated states combined have issued some 64,000 Clean Water Act permits for existing discharges. If, as the Eleventh Circuit's decision in *Miccosukee* suggests, the over two million dams and diversion structures across the nation require NPDES permits, a fundamental restructuring of the administration of such permits—far beyond what Congress envisioned in creating the NPDES program—will be required.

The United States Courts of Appeals in several circuits have considered this issue and have reached different conclusions. Both because of the importance of this issue to hundreds of municipalities and regional authorities engaged in water supply and flood control activities across the country, and because of the split among the circuits, this Court should issue a writ of certiorari in this case.

FACTUAL BACKGROUND

The facts of *Miccosukee* and the Second Circuit's *Catskill Mountains* case are typical of the diversions and transfers frequently undertaken by municipal and regional water management agencies for water supply, flood control, and other local water management purposes. We thus describe the facts in *Catskill Mountains* in some detail to illustrate the types of facilities currently operating, without federal Clean Water Act permits, throughout the United States.

Such facilities serve important public functions. Equally importantly, as illustrated by the facts described below, obtaining a permit is not a simple ministerial process. Accordingly, the recent decisions of the Second and Eleventh Circuits threaten to disrupt basic water management operations across the nation.

New York City owns and operates a water supply system in upstate New York. The facility at issue in the *Catskill Mountains* case, the Shandaken Tunnel, transfers water from one of the two reservoirs that comprise New York City's Catskill water supply system, the Schoharie, to the other, the Ashokan reservoir. Specifically, the Tunnel moves water from the Schoharie reservoir to the Esopus Creek, the main tributary to the Ashokan. New York City's average demand for water is about 1.2 billion gallons per day, of which the Catskill system generally provides about 40%. Approximately 40% of the Catskill supply, or 16% of New York City's drinking water, originates in the Schoharie Reservoir. The Ashokan reservoir went into service in 1915. The Shandaken Tunnel and the Schoharie reservoir were both on line by 1926.

New York City does not treat water collected in the Schoharie reservoir before diverting it through the

Shandaken Tunnel. However, the Catskill Mountains are characterized by extensive deposits of silts and clays, which are often exposed by erosion, particularly during storms. As a result, water in the Schoharie reservoir and released from the Tunnel regularly contains elevated levels of suspended solids, and thus turbidity. Based on extensive research and analysis, New York City believes that no matter what reasonable structural and programmatic measures are implemented, the discharges from the Shandaken Tunnel will continue, on a regular basis, to be visibly more turbid than the receiving water, the Esopus Creek.

Clean Water Act permits must include effluent limits to "achieve water quality standards … including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1). The state water quality standard for discharges of turbid waters in New York is: "no increase that will cause a substantial visible contrast to natural conditions." 6 New York Codes, Rules and Regulations (N.Y.C.R.R.) § 703.2. Because there may not be a practicable way to ensure that discharges from the Shandaken Tunnel are never more turbid than the receiving waters, it is possible that New York City will be unable to obtain a Clean Water Act permit for its transfer of water through the Tunnel. Under the Second Circuit's decision in *Catskill Mountains*, New York City is in violation of the Clean Water Act every time it transfers water through the Tunnel. This could lead to a prohibition against New York City's continued use of the approximately 16% of its water supply, jeopardizing New York City's ability to ensure an adequate supply of water to meet its daily demand.

Similarly, the myriad water management facilities involved in analogous diversions and transfers of natural, untreated water for water supply and flood control purposes

(including other portions of New York City's water supply system) face similar risks, of continually violating the Clean Water Act or ceasing fundamental water management activities, if the novel interpretation of the Clean Water Act recently adopted by the Second and Eleventh Circuits is left to stand. The facts of *Miccosukee* illustrate the potential impacts of this interpretation for flood control facilities: the injunction initially issued by the district court would "cause substantial flooding in western Broward County which, in turn, would cause damage to and displacement of a significant number of people." 280 F.3d 1364, 1369-70.

Moreover, diversions or transfers of natural, untreated water are often vital to sustaining a healthy aquatic environment in the receiving water body. For instance, water from the Shandaken Tunnel, which is generally cold, is essential to maintaining the trout fishery in the Esopus Creek, especially during the summer when temperatures in the Creek rise and natural flow (that is, flow without the addition of water from the Tunnel) is diminished. If the reasoning of the Second and Eleventh Circuits is upheld, operators of water supply or flood control infrastructure may be forced to alter or even eliminate diversions or transfers of water, in the interest of avoiding liability under the Clean Water Act, but to the detriment of ecosystems that depend on such flows. Such a result runs counter to the goals of the Clean Water Act.

The biochemical constituents of distinct, untreated bodies of water are inevitably different from one to another. Thus, diversions or transfers of untreated water are likely to involve transfers of water containing certain constituents in higher concentrations than they may occur in the receiving waters, such as turbidity in the *Catskill Mountains* case or the nutrients at issue in *Miccosukee*. Such incidental

movements of the natural constituents of untreated water should not be considered "additions" of pollutants under the Clean Water Act.

ARGUMENT

The Clean Water Act provides that unless a discharge permit is obtained, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §§ 1311(a), 1342. A discharge permit is required when (1) a pollutant is (2) added (3) to navigable waters (4) from (5) a point source. 33 U.S.C. §§ 1311(a), 1342, 1362(12); *see also National Wildlife Federation v. Consumers Power*, 862 F.2d 580, 582 (6th Cir. 1988). In *Miccosukee, Catskill Mountains*, and *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996), Courts of Appeals have abandoned an established line of appellate cases and have determined that a transfer of untreated water can be an "addition" under the Clean Water Act.

As discussed above, this new interpretation of the Clean Water Act will affect a vast array of municipal water management activities nationwide. The recent appellate decisions threaten the continued operations of certain facilities that are vital for water supply, local government water management, and flood control. These decisions run counter to Congress' intent that states and local governments retain autonomy over local water management decisions.

If these decisions are not reversed, the scope of the Clean Water Act's NPDES permit program will far exceed the capacities of EPA and states with delegated authority to administer the program. According to EPA, "more than 64,000 facilities nationwide" currently have NPDES permits. *See* http://www.epa.gov/compliance/planning/data/water/pcssys.html (last updated October 26, 2002). Even

with the current volume, EPA and the delegated states have not been able to administer the NPDES program in accordance with the statutory requirement that NPDES permits be issued for no more than five years. *See* 33 U.S.C. § 1342(b)(1)(B). EPA has established a goal of reducing the backlog of all permits to 10% by the end of 2004. *See* http://cfpub.epa.gov/npdes/permitissuance/goals.cfm (last updated October 30, 2002). As of October 31, 2000 (the date of the information on EPA's website), at least 21% of NPDES permits issued had expired, and only 70% were known to be current. *See* http://cfpub.epa.gov/npdes/images/permit_backlog. gif.

In contrast, there are over two million dams, and countless other diversion structures across the nation that are currently operating in accordance with various applicable state and local regulation but without NPDES permits. *See, e.g., Gorsuch,* 693 F.2d 156, 182. In light of the manifest administrative problems with the NPDES program, even with its current scope, a more than 30-fold increase in the number of entities requiring Clean Water Act permits would overwhelm permitting agencies across the nation. The scope of the NPDES program under the Eleventh Circuit's decision in *Miccosukee* is more than an order of magnitude greater than Congress or regulators have envisioned during the 30 years since the Clean Water Act took effect.

In holding that the release of natural, untreated water is governed by the Clean Water Act's permitting requirements as set forth in 33 U.S.C. §§ 1311(a) and 1342, the Second and Eleventh Circuits departed from the interpretation of the term "addition" adopted by District of Columbia and Sixth Circuits. No prior case law supports the proposition that the mere transfer of untreated water, from one water body to another, is, in and of itself, an

"addition" of pollutants requiring a Clean Water Act permit. Prior cases interpreting the Clean Water Act found that more than a mere diversion of flow from one body to another is necessary to constitute an "addition" under the Act—pollutants must be added at the point source itself.

I

RECENT DECISIONS OF THE FIRST, SECOND AND ELEVENTH CIRCUITS CANNOT BE RECONCILED WITH THE INTERPRETATION OF "ADDITION" ADOPTED BY THE DISTRICT OF COLUMBIA AND SIXTH CIRCUITS.

In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 164 (D.C. Cir. 1982), the court addressed whether dam-induced water quality changes are "addition[s] that trigger the NPDES permit requirement." The court agreed with EPA that they were not, because a pollutant was not physically introduced "into the water from the outside world." *Id.* at 175. Once a pollutant already exists in navigable water, there can be no subsequent addition of that pollutant, even if that water is transferred from one body of navigable water to another. Similarly, in *National Wildlife Federation v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988), the court held that the release of fish and fish parts from a hydroelectric plant downstream from the source of the intake water did not constitute an "addition" because it simply moved pollutants already in the water. Other courts have recognized the principle that an addition does not occur where pollution is merely passed "from one body of navigable water to

another."[2] *See, e.g., Committee to Save Mokelumne River v. East Bay Municipal Utility Dist.*, 13 F.3d 305, 308 (9th Cir. 1993), *cert. denied sub nom. Members of Cal. Reg'l Water Quality Control Board v. Comm. to Save Mokelumne River*, 513 U.S. 873 (1994).

In contrast, the Eleventh Circuit held in this case that discharges from a pump that allows the South Florida Water Management District to move water from one side of a levee to the other for flood control, a "mere diversion in the flow of waters," required an NPDES permit. The Eleventh Circuit followed the recent Second Circuit decision in *Catskill Mountains*, concerning the releases of untreated water from New York City's Shandaken Tunnel, and *Dubois v. United States Dep't of Agric.*, a case involving a private company's diverting water from a pond and two other sources, using it to create snow for skiing, and then returning the water to the pond.[3] 280 F.3d at 1369, n.7.

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[2] This is consistent with the language of the statute, which refers to the addition of a pollutant to navigable "waters" rather than to navigable "water." 33 U.S.C. § 1362(12). The use of the collective term "waters" suggests that an "addition" requiring a permit would be an addition to the system of navigable waters as a whole, rather than the incidental transfer of pollutants from one body of water to another.

[3] *Amici*, representing cities and other public entities engaged in water supply, flood control, and other water management activities, believe that *Dubois* is distinguishable from *Miccosukee* and *Catskill Mountains*. In contrast to *amici's* activities, *Dubois* defendant Loon Mountain Recreation Corporation was processing the diverted water through snowmaking equipment. The Circuit Court found it significant that the water was "commercially exploited" between the time of its intake into the snowmaking equipment and the time it was released. 102 F.3d at 1297. The commercial exploitation meant that water was removed from the waters of the United States, and then was released into the waters of the United States after it was processed in the snowmaking equipment. *Id.* Because of the similarity of the principle involved, however, we include the case in our discussion of the split among the Circuits.

II

GORSUCH AND *CONSUMERS POWER* ARE NOT DISTINGUISHABLE FROM *MICCOSUKEE* AND *CATSKILL MOUNTAINS.*

In its attempt to reconcile *Gorsuch* and *Consumers Power* with its decision in this case, the Eleventh Circuit noted that the District of Columbia and Sixth Circuits in those earlier cases may have accorded EPA's interpretation of "addition" undue deference, since they were decided under the standard of deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). 280 F.3d at 1368, n.5. The Eleventh Circuit relied upon *Christensen v. Harris County*, 529 U.S. 576 (2000) for the proposition that EPA's interpretation is entitled to only a limited degree of deference, rather than great deference, because its interpretation was not subjected to the rigors of notice and comment rulemaking.

Although in *Gorsuch*, the District of Columbia Circuit Court of Appeals stated that the EPA interpretation was entitled to "great deference" (*Gorsuch*, 693 F.2d at 170), the decision itself demonstrates that the court did not simply defer to EPA. Rather, it contains a detailed analysis of the specific language of the Clean Water Act and its legislative history, as well as an evaluation of policy,

weighing the interests of preserving the integrity of the waters of the United States against the interests of states in water management. Accordingly, the *Gorsuch* court did not give undue deference to the EPA interpretation, despite its statement that EPA's position was entitled to "great deference." The *Gorsuch* court labored to ensure that it evaluated the competing interests of the Clean Water Act against local water management issues. Thus, *Gorsuch* is consistent with the *Christensen* standard of deference because the court gave deference to the EPA position, but only to the extent that it was persuaded that EPA's position was consistent with its analysis of the language, legislative history, and policy behind the Clean Water Act.

Because the *Gorsuch* court did not simply defer to the EPA interpretation of the Clean Water Act, *Christensen* does not support the Eleventh Circuit's departure from the principle that the mere transfer of untreated water that naturally contains pollutants is not regulated by the Clean Water Act. Similarly, in *Consumers Power*, while it discussed EPA's position in light of the then-applicable *Chevron* standard, the Sixth Circuit relied on a detailed analysis of congressional intent in reaching its decision that transfers of water from a dam used as a hydroelectric facility were not "additions" under the Clean Water Act. 862 F.2d at 586-588.

In contrast to the District of Columbia and Sixth Circuit Courts of Appeals, which considered several factors in addition to the EPA interpretation, the Eleventh Circuit did not conduct such a detailed analysis. Rather, it used *Christensen* to support its departure from the long line of cases interpreting the Clean Water Act, without any consideration of the legislative history or weighing of

interests.[4] For these reasons, *amici* respectfully submit that the decisions in *Gorsuch* and *Consumers Power* continue to represent the law of the District of Columbia and Sixth Circuits, and therefore that the recent decisions by the First, Second, and Eleventh Circuits create an inconsistency in interpretation of the Clean Water Act that should be resolved by this Court.

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[4] In *Catskill Mountains*, the Second Circuit declined to reach a conclusion as to the current status of the *Gorsuch* and *Consumers Power* decisions, but instead distinguished those cases on the theory that in those situations, unlike the discharges from New York City's Shandaken Tunnel, "the water from which the discharges came is the same as that to which they go." 273 F.3d at 492. The Second Circuit's distinction of these cases reflects a fundamental misunderstanding of how dams affect water. The Second Circuit distinguished *Gorsuch* and *Consumers Power* by concluding that confining water in a dam or reservoir, and then releasing that water, is fundamentally different from diverting water so that it flows from one body into another. To illustrate this point, the Second Circuit suggested that the dam situation is analogous to lifting soup with a ladle from a pot and then returning the ladleful to the same pot. *Catskill Mountains*, 273 F.3d at 492. The Second Circuit concluded that just as nothing has been added to the soup, nothing would be "added," within the meaning of the Clean Water Act, to the water into which a dam discharges. When water is impounded by a dam, however, its biochemistry is fundamentally altered. *See, e.g., Consumers Power*, 862 F.2d at 585 (recognizing that "storage dams ... actually transform the essential character of the water for its biological inhabitants"). Thus, the water released from a dam is likely to be as different from the downstream receiving waters, in terms of pollutant levels, as waters from distinct watersheds. Its use of the ladle example demonstrates that the Second Circuit did not understand the significance of the changes caused by damming.

CONCLUSION

The case before the Court represents an issue of importance to municipalities and public entities across the nation involved in water supply, local water management, and flood control. The Circuit Courts of Appeals have reached different conclusions on the question of what constitutes an "addition" under the Clean Water Act. It is thus appropriate for this Court to resolve the confusion that has been created by the diverse decisions in similar cases.

For all the foregoing reasons, *amici* respectfully request that their motion for leave to file this brief be granted. *Amici* further respectfully request that the petition for certiorari be granted and that the decision of the Court of Appeals for the Eleventh Circuit, which has serious potential negative consequences for the many public agencies and authorities involved in water management for water supply and flood control, be reversed.

Respectfully submitted,

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